

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs July 28, 2009

**STATE OF TENNESSEE v. BETHANY R. MERCER**

**Appeal from the Criminal Court for Hamilton County**  
**No. 268987 Barry A. Steelman, Judge**

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**No. E2009-00003-CCA-R3-CD - Filed December 22, 2009**

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Following the Hamilton County Criminal Court's denial of her motion to suppress, the pro se Defendant, Bethany R. Mercer, pled guilty to driving under the influence (DUI), a Class A misdemeanor, and received an effective sentence of eleven months and twenty-nine days, suspended after the service of twenty-four hours of incarceration and three days of public service. See Tenn. Code Ann. § 55-10-403(s)(2)(repealed July 1, 2008). Pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(A), the Defendant reserved a certified question of law challenging the legality of her detention and her subsequent arrest. Following our review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Bethany R. Mercer, Hixson Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; William H. Cox, III, District Attorney General; and C. Matthew Rogers, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

**OPINION**

The record reflects that the Defendant was indicted for driving under the influence, speeding, failure to maintain safe travel within the traffic lane, and failure to obey a traffic light relative to her January 4, 2008 early morning travels on the streets of Chattanooga. The Defendant filed a motion to suppress alleging that the arresting officer did not possess reasonable suspicion to justify the stop and further detention. She argued that the video recording of the officer's pursuit of her vehicle did not show any violation of the traffic laws sufficient to justify the stop. Following an evidentiary hearing, the trial court denied the motion to suppress.

Chattanooga Police Department Officer David Allen testified that he was working third shift with the traffic division on January 4, 2008, when he observed the Defendant's vehicle cross the fog line and drift toward the shoulder. Based upon this observation, Officer Allen decided to follow the vehicle in order to determine "if there w[ere] any reasons to stop [the Defendant]." After observing the vehicle drift over or onto the center line several times and exceed the speed limit, Officer Allen performed a traffic stop which later revealed that the Defendant was driving under the influence.

Although the trial court failed to make any written findings in its order, the transcript reflects that the trial court found that the officer had reasonable suspicion to effectuate the stop based upon the "drifting" of the Defendant's vehicle over or near the line on nine separate occasions, speeding, and an inoperable brake light. The trial court based these findings upon the testimony of the officer as well as its own review of the video recording of the pursuit. Following the denial of the motion to suppress, the Defendant pled guilty to DUI and received a sentence of eleven months and twenty-nine days suspended after the service of twenty-four hours of incarceration and the completion of three days of public service. On appeal, she alleges that the trial court erred in denying her motion to suppress.

### *Jurisdiction*

Tennessee Rule of Criminal Procedure 37 permits a criminal defendant to plead guilty and appeal a certified question of law when the defendant has entered into a plea agreement under Rule 11(a)(3) of the Rules of Criminal Procedure and has "explicitly reserved - with the consent of the state and of the court - the right to appeal a certified question of law that is dispositive of the case." Tenn. R. Crim. P. 37(b)(2)(A). As a prerequisite to this court's review, the final order or judgment appealed from must contain a statement of the certified question that clearly identifies the scope and legal limits of the question, including the agreement by both the defendant, the trial court, and the State that the question is dispositive of the case and is explicitly reserved for appellate review as part of the plea agreement. State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988).

As an initial matter, the State asks this court to dismiss the appeal and contends that this court is without jurisdiction to review the propriety of the trial court's denial of the motion to suppress due to the absence of any reference to a separate order or specific reservation of a certified question of law in the judgment. The record reflects that the judgment was entered on November 17, 2008. The judgment does not indicate that the Defendant pled guilty pursuant to Rule 37(b)(2)(A). The record further reveals that a separate order was entered on that same date. The order, entitled "Final Order," represents the trial court's decision to deny the motion to suppress, accept the Defendant's plea of guilty to DUI, and reserve a certified question of law that is dispositive of the case with the consent of the court and the State; the order also identifies the limits and scope of the certified question in compliance with Preston. However, the order is not incorporated by reference into the judgment of conviction.

Our supreme court has repeatedly made clear that the Preston requirements "for appealing a certified question of law under Rule 37 of the Tennessee Rules of Criminal Procedure [are] 'explicit and unambiguous.'" State v. Armstrong, 126 S.W.3d 908, 912 (Tenn. 2003)(quoting State v. Irwin, 962 S.W.2d 477, 479 (Tenn.1998); State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn.

1996)). In some instances, we have concluded that this court did not have jurisdiction when a judgment failed to incorporate by reference a separately entered order regarding a certified question. See, e.g., State v. Melissa A. Simmons, No. M2003-03064-CCA-R3-CD, 2005WL468295 (Tenn. Crim. App. Feb. 25, 2005); State v. Lillie Fran Ferguson, No. W2000-01687-CCA-R3-CD, 2001WL432519 (Tenn. Crim. App. Apr. 27, 2001).

However, in this case it is clear from the transcript of both the suppression hearing and the guilty plea submission hearing that the Defendant intended to plead guilty pursuant to Rule 37(b)(2)(A). Likewise, the plea acceptance form also indicates that the Defendant entered her guilty plea with the intention to reserve a certified question of law. We are mindful of our supreme court's recent instruction that we are to strive toward the "dual goals of avoiding technicality and expediting a just resolution of the case on its merits." State v. Byington, 284 S.W.3d 220, 223 (Tenn. 2009) (quoting State v. Housler, 167 S.W.3d 294, 296 (Tenn. 2005)). The "Final Order" indicates a denial of the motion to suppress, acceptance of the Defendant's guilty plea, and reservation of the certified question with the consent of the trial court and the State. This order was filed contemporaneously to the judgment in this case and was signed by both parties and the trial court. See Armstrong, 126 S.W.3d at 912 (order that was filed nunc pro tunc to the filing date of the judgment and that complied with Preston requirements was sufficient to establish jurisdiction even absent reference of the corrective order in the original judgment); but see Irwin, 962 S.W.2d 477 (corrective action taken after the trial court's loss of jurisdiction of the case is of no effect to properly certifying a question of law). All of these factors are important considerations leading us to conclude that the certified question of law has been properly reserved despite the failure to incorporate by reference the contemporaneously filed final order into the judgment. See, e.g., State v. Paul Anthony Wright, No. W2001-02574-CCA-R3-CD, 2003WL1860526 (Tenn. Crim. App. Apr. 7, 2003) (when judgment form standing alone may be insufficient to satisfy the Preston requirements, a contemporaneously filed separate order which meets the Preston requirements may suffice even though it is not referenced in the judgment form). Accordingly, we conclude as did our supreme court in Armstrong that "the circumstances of this case demonstrate that the requirements of Preston were met and that the [D]efendant properly reserved a certified question of law for appeal." Armstrong, 126 S.W.3d at 912.

### *Denial of Motion to Suppress*

A trial court's findings of fact on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000). Likewise, questions of credibility, the weight and value of the evidence and the resolution of conflicting evidence are matters entrusted to the trial court, and this court will not reverse the trial court's factual findings unless the evidence preponderates against them. Id. (citing State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996)). Additionally, the evidence is to be viewed in the light most favorable to the prevailing party on a motion to suppress with all reasonable and legitimate inferences that may be drawn by the evidence. State v. Carter, 16 S.W.3d 762, 765 (Tenn. 2000). However, our review of the application of the law to the facts is de novo. State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998).

The Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protect against unreasonable searches and seizures. Any warrantless search

or seizure is presumed to be unreasonable and requires the State to prove by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement. State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998). Relevant to our inquiry in this case is the exception that a police officer may make an investigatory stop based upon reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed. Terry v. Ohio, 329 U.S. 1, 20-21 (1968); Binette, 33 S.W.3d at 218.

A police officer must have such a reasonable suspicion in order to stop a vehicle without a warrant. State v. Randolph, 74 S.W.3d 330, 334 (Tenn. 2002). Our supreme court has stated that “when an officer turns on [his] blue lights,” a stop has occurred. State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993). Reasonable suspicion is determined by an examination of the totality of the circumstances. Binette, 33 S.W.3d at 218. Circumstances relevant to an analysis of reasonable suspicion include “the officer’s personal objective observations . . . [and any] [r]ational inferences and deductions that a trained officer may draw from the facts and circumstances known to him.” State v. Yeargan, 958 S.W.2d 626, 632 (Tenn. 1997).

In denying the motion to suppress, the trial court found after viewing the video that the Defendant’s vehicle did drift or cross, in varying degrees, her lane of traffic on nine separate occasions. The trial court also considered that the Defendant was “clocked” traveling 71 miles per hour in a 65 miles per hour zone, although the trial court noted that it did not give this fact much weight. The trial court also noted that the Defendant’s brake light was out. The trial court further found that these three factors were noted by Officer Allen prior to the activation of his blue lights; in other words, all three factors contributed to Officer Allen’s decision to stop the Defendant. Ultimately, the trial court found that all three factors – drifting and /or crossing the line, speeding, and an inoperable brake light – “would constitute a reasonable and articulable suspicion enough to make a stop.”

On appeal, the Defendant argues that the video reflects that her vehicle touched the line “at times when a reasonable person might do so: when the road is curving, when her vehicle is about to merge . . . and when she is about to change lanes.” She argues that the totality of the circumstances do not support a finding of reasonable and articulable suspicion by the trial court. The State argues that the evidence does not preponderate against the trial court’s findings. Following our review, we agree with the State.

In the light most favorable to the State, Officer Allen testified that he began to follow the Defendant when he saw her vehicle drift over the right hand line toward the shoulder of the highway. He reported that he observed the Defendant’s vehicle drift several times and ultimately decided to make a traffic stop when the vehicle “drifted back and completely straddled [the] dashed line.” Officer Allen additionally testified that he clocked the Defendant’s vehicle traveling 71 mph in a 65 mph zone prior to activating his blue lights. Therefore, we conclude that the evidence does not preponderate against the trial court’s findings that this evidence was sufficient to support a reasonable suspicion to stop the Defendant’s vehicle. Therefore, the judgment of the trial court denying the motion to suppress is affirmed.

## CONCLUSION

The Defendant properly presented a certified question of law. Following our review, the trial court's denial of the Defendant's motion to suppress is affirmed.

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D. KELLY THOMAS, JR., JUDGE